

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1388

To be argued by
Howard L. Jacobs

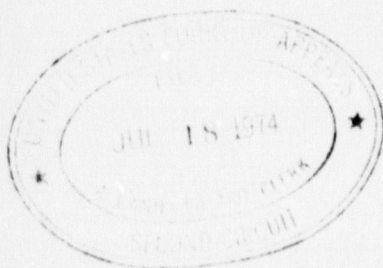
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
 :
 -against- :
 :
 RAUL ORTEGA-ALVAREZ, CIRO RODRIGUEZ- :
 CALANA, JORGE INFIESTA, CHARLES :
 BUSIGO-CIFRE, DOMINGO DEL CRISTO, :
 ARMANDO GARCIA-ALVAREZ, CIRILLO :
 FIGUEROA, :
 :
 Appellants. :
-----X

Docket No. 74-1388

BRIEF FOR APPELLANT DEL CRISTO

Appeal From A Judgment Of Conviction
Rendered In The United States District
Court For The Southern District Of New
York.



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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal by Domingo Del Cristo from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles M. Metzner) rendered April 22, 1974, after a four week jury trial, convicting appellant of the purchase and receipt of heroin and conspiracy so to do in violation of Title 21, United States Code, Sections 173 and 174.

Appellant Del Cristo was sentenced as a second offender to the mandatory minimum sentence of ten (10) years imprisonment on Counts One and Six, the sentences on each count to run concurrently with each other.

STATEMENT OF FACTS

The Proceedings Below

Appellant Del Cristo was indicted in two counts of a seventeen count indictment with the other seven appellants and fourteen other defendants. Six (6) defendants, Luis Reyes-Padron, Jose Luis Sarria, John Doe a/k/a "Roberto", Francisco Orlando Perez, Jose Ramirez-Ramos and John Doe a/k/a Roberto Lopez, were not apprehended prior to trial. On January 22, 1974, Judge Metzner dismissed Count 1 as to defendant Carlos Tapanes. That was the only count in which he was named. On February 19, 1974, defendant Orlando Gil waived indictment and pleaded guilty to selling narcotics not

in or from a stamped package (74 Cr.180). On February 20, 1974, Judge Metzner dismissed Count One against defendant Joaquin R. Prada and severed Prada from the trial as to his remaining count, Count 12.

On February 20, 1974, the trial commenced as to the remaining thirteen defendants on twelve counts, eleven substantive counts and Count One, the conspiracy. At the conclusion of the Government's case Judge Metzner dismissed both counts naming defendant Rigoberto Rosal-Rodriguez, and Count Nine against defendant Hugo Viera. On March 20th the jury rendered its verdict. The jury found defendants Francisca Rodriguez Calana, Hugo Viera, Jose Aquilera and Hector Echeverria not guilty on all counts in which they were named. They also found the following defendants guilty on the counts set forth.

<u>Defendant</u>	<u>Counts</u>
Raul Ortega	1, 2 and 3
Charles Busigo-Cifre	1 (Not Guilty on Count 5)
Armando Alvarez	1 and 8
Jose Otero	1 and 14
Cirillo Figueroa	1 and 11
Jorge Infiesta	1 and 3
Domingo Del Cristo	1 and 6
Ciro Rodriguez-Calana	1 and 2

Appellant Del Cristo is presently free pending appeal on a \$25,000.00 bond secured by \$2,500.00 cash.

The Government's Case

A. Introduction: Nature of Conspiracy and Roles of Conspirators.

This case involves the sale and distribution of 45 kilos of heroin in the New York metropolitan area. The sellers and distributors were appellant Raul Ortega-Alvarez and the two principal government witnesses, Miguel Rodriguez and Ramiro Gonzalez Infante. The remaining seven appellants and the other fourteen defendants were all customers of Ortega, Rodriguez and Gonzalez, except for appellant ~~Ciro Rodriguez-Calana~~ and his wife, acquitted defendant Francisca Rodriguez Calana, relatives of Ortega, who kept the heroin in their house. The distribution took place in March, April and May, 1970, in New York, New Jersey and on Long Island.

As is usual in such cases, the Government's case against appellants and the acquitted defendants rose and fell upon the credibility of Rodriguez and Gonzalez. As to many incidents their testimony was in direct conflict, creating for the jury a dilemma as to which version to choose as to the defendants involved in the incidents. These conflicts have a bearing on the decision of this appeal and will be discussed later in greater detail.

B. Ortega Receives 45 Kilos of Heroin.

In January, 1970, Roberto Arenas agreed to take 60 kilos of heroin from Hosep Caramian. On February 2, 1970, Manuel Noa came to New York from Miami and at Arenas'

request went to the airport with Caramian to pick up the heroin. At the airport Caramian gave Noa three gray suitcases containing the sixty (60) kilos of heroin which Noa stashed in an apartment in New York. Noa sold five (5) kilos of the heroin during the next two or three weeks. Because he thought he was being followed, he gave the rest of the heroin to Arenas, by dropping it off at an apartment on Audubon Avenue between 187th and 188th Streets in New York (692-702, 736-740). *

Segundo Coronel informed Arenas that appellant Ortega would take the remaining 55 kilos. Arenas delivered the heroin to Ortega on about February 15 or 16, 1970, and was told by Ortega that he was going to take the heroin to his brother-in-law's apartment. Later, Caramian asked for return of 20 kilos of the heroin from Ortega. At Arenas' apartment Caramian reduced this request to 10 kilos, which Ortega gave to him, leaving Ortega with 45 kilos. Ortega left by car with his brother-in-law, appellant Calana (741-747).

C. Ortega Gets Gonzalez And Rodriguez To Help Sell The Heroin.

On March 10 or 11 in Miami, Ortega told Gonzalez he had 45 kilos of heroin in New York and asked him to help sell it and share the profits 50-50. Gonzalez agreed. With

* Refers to pages of the Trial Transcript.

\$300.00 given to him by Ortega, Gonzalez purchased a sealing machine, plastic bags and airline tickets for them to Newark Airport. Enroute to Newark, Ortega told Gonzalez he had already sold 3 kilos to appellant Infiesta, and Luis Reyes. Upon arrival they stayed at the Saxony Motel in New Jersey (819-823).

The next day at the Calana's apartment in Elizabeth, New Jersey, Ortega showed Gonzalez two suitcases of heroin and told Gonzalez there was a third suitcase at another apartment. Ortega and Gonzalez then went to Infiesta's apartment in New York, where Infiesta asked Gonzalez if he could get Ortega to give him a better price and better quality heroin. Gonzalez said he would try (824-828, 1553-1555).

Gonzalez then went to Rodriguez's home in Westbury, Long Island, where he told Rodriguez about the heroin and asked for his aid in selling it. Rodriguez said he knew an Italian who wanted heroin and would get in touch with him. Rodriguez talked to the Italian, Mike Sifori, and arranged to sell 1 kilo to some Italian friends of Sifori (Federal Narcotic Agents). (85-88, 828-831).

The same day, Ortega, Rodriguez and Gonzalez discussed their financial arrangements. Ortega had told Gonzalez on the plane that he was paying \$14,500.00 per kilo

for the heroin, and was giving Calana \$1000.00 per kilo to stash it. He told Gonzalez and Rodriguez not to sell the heroin for less than \$18,000.00 per kilo. He and Gonzalez were to split the \$2,500.00 profit between \$15,500.00 and \$18,000.00 and Gonzalez and Rodriguez could share anything they got over \$18,000.00 per kilo. This was besides the profit on any mixtures they took out in cutting the heroin. Ortega told them some of the heroin was white, some gray. The gray heroin could be cut (diluted) fourteen times, the white, ten to twelve times. Ortega O.K.'d the sale to Sifori (117-118, 831-834).

D. Rodriguez and Gonzalez Sell Heroin To Agents.

Much to the later unhappiness of Rodriguez and Gonzalez, their first customer was an undercover agent of the Drug Enforcement Administration, Thomas J. Angioletti, on March 13th. Rodriguez and severed defendant, Joaquin R. Prada, were introduced by Sifori to Angioletti and his partner, Agent Frank Tumillo. After some discussion of cocaine, Angioletti agreed to purchase one kilo of heroin for \$25,000.00, but wanted a sample first. Rodriguez tried to get the sample from Ortega, who said he was trying to get it from Infiesta. Prada ended up delivering a sample of his own heroin to Angioletti from a steam pipe at his gas station at 165th Street and Amsterdam Avenue (89-101, 1369-1387).

Gonzalez, according to his testimony, went to Calana's apartment and picked up two and one-half (2½) kilos of heroin which he brought to Rodriguez at Infiesta's apartment. According to Rodriguez, he, Gonzalez, Infiesta and Infiesta's wife, waited at Infiesta's place while Ortega got the heroin which he left on the seat of his sister's car. In any event, Rodriguez and Gonzalez went to Prada's gas station to deliver one kilo of heroin to Angioletti (101-103, 834-837).

At the station Gonzalez waited outside, while Rodriguez delivered the heroin to Angioletti who gave him \$25,000.00. Rodriguez gave the money to Gonzalez and they drove back to Infiesta's apartment where Gonzalez gave Ortega \$18,000.00. Rodriguez and Gonzalez each kept \$3,000.00 and the other \$1,000.00 Rodriguez gave to Sifori (103-107, 128-131, 844-849, 1388-1392, 1395-1399, 1484-1487, 1524-1527).

On March 16, Rodriguez, Gonzalez, Angioletti and Tumillo met at Luigi's Restaurant on 178th Street and Broadway, where they discussed the first purchase and future sales. Ortega was at the bar of the restaurant, having come with Gonzalez. On March 19 Angioletti and Tumillo met with Rodriguez and Gonzalez and agreed to buy a second kilo for \$24,000.00. On March 31 the second kilo was delivered by

Carlos Tapanes at a diner in Hicksville, Long Island. Angioletti paid Rodriguez \$24,000.00. Rodriguez gave Tapanes \$500.00 for the delivery, Gonzalez refused to give his \$500.00 share. There were several later discussions about a ten kilo purchase, but nothing came of them (131-147, 202-203, 849-851, 1399-1423, 1487-1490, 1605-1613).

E. Mixing and Packing of Heroin.

Gonzalez testified on the morning of March 13th he delivered 7 kilos of heroin to Infiesta's apartment. Present at the apartment with Gonzalez were Infiesta, Ortega, Rodriguez and Reyes. The 7 kilos were diluted with milk sugar to make 8 kilos and 9 ounces. Ortega took seven kilos for Arenas; Infiesta and Reyes took 1 kilo and Gonzalez took the other 9 ounces back to New Jersey (61A-63A). **

This is Gonzalez' version of the incident, Rodriguez' version differs somewhat. He testified that he, Gonzalez, Calana and Ortega went to Infiesta's apartment where Ortega asked Infiesta for heroin he had stashed there. Ortega and Infiesta then mixed four kilos into five and put it in kilo and half-kilo packages. Reyes and Figueroa then arrived. Ortega gave 1½ kilos to Infiesta and Reyes, took 3 kilos himself and asked Infiesta to "stash" ½ kilo. Infiesta said he would keep it in a car downstairs to keep the apartment "clean". He, Ortega, Gonzalez and Calana then

*Refers to joint Appendix of appellants Infiesta and Del Cristo.

went to 110th Street and Broadway, where Ortega delivered the 3 kilos to Juan Chaveco. Ortega said he'd made two deliveries each to Chaveco and Reyes and that Rodriguez and Gonzales should get active and sell the rest of the heroin (42A-46A).

The heroin was also mixed and cut at the Calana apartment in Elizabeth. Once appellant Calana helped mix, and also went from New York to New Jersey to get heroin. The acquitted defendant, Mrs. Calana, was present when heroin was mixed (115-117, 857-861).

F. Rodriguez and Gonzalez Sell Heroin To Figueroa.

Rodriguez and Gonzalez started looking for customers other than the agents and spread word of their shipment of heroin. Two or three days after the sale to Angioletti, Rodriguez, Gonzalez and Ortega went to the Calana house where Rodriguez told Ortega he needed $1\frac{1}{2}$ kilos for appellant Cirillo Figueroa, and Prada. Ortega took the heroin from a suitcase, diluted it with milk sugar, and gave it to Rodriguez (107-115).

Figueroa told Rodriguez and Gonzalez he had been buying heroin from Infiesta and Reyes and wanted to buy from them. They agreed to sell it directly to him for \$19,000.00 a kilo. They delivered a total of $5\frac{1}{2}$ kilos of heroin to Figueroa in March and April, 1970. Once Rodriguez delivered

one kilo to a man who Figueroa introduced him to and lived on 175th Street and Broadway; another kilo was delivered by Rodriguez at Figueroa's direction to dismissed defendant, Rosal-Rodriguez; and once at Figueroa's instructions, Gonzalez delivered a kilo to Luis Despaines at acquitted defendant Viera's apartment. Figueroa paid Gonzalez for this heroin at the 005 Bar. Figueroa wanted more heroin, but they had no more (212-225, 923-926, 942-946).

G. Rodriguez and Gonzalez Sell Heroin to Alvarez.

Rodriguez and Gonzalez were introduced to Alvarez by Viera. They agreed to sell Alvarez a kilo of heroin for \$20,000.00. Rodriguez delivered the heroin to Alvarez, who paid Gonzalez. Later, Gonzalez delivered in two deliveries a total of 3 kilos to Alvarez at Viera's apartment. Alvarez ordered another kilo from Gonzalez in Miami, Rodriguez was supposed to deliver it to Viera in New York, but testified he never delivered any heroin to Viera. Finally, Gonzalez and Rodriguez delivered 1 kilo or 1½ kilos to Alvarez on 158th Street and Broadway, in New York. Part payment for the last delivery was made with 9 ounces of cocaine (230-238, 899-905, 908-922).

H. Rodriguez Sells Heroin to Orlando Gil and Paco Perez Who Resell it to an Agent.

Once again Rodriguez sold heroin to the wrong men. On March 13, 1970, defendants Paco Perez and Orlando Gil sold ½ kilo of heroin to Agent Frederick W. Ford for

\$11,500.00. Rodriguez sold 1/4 kilo to Perez and Gil in the latter part of March. Gil thought Rodriguez supplied the heroin they sold to Ford (238-242, 643-650, 658, 668-677, 681-686).

I. Rodriguez and Gonzalez Sell Heroin to Cifre and Echeverria.

It is unclear from the testimony whether there was one or two half-kilo sales to appellant Charles Busigo-Cifre. Gonzalez testified to two sales, one on March 13 about an hour after the sale to Angeoletti and the second several days later with Rodriguez making the delivery. Both deliveries were to a man designated by Cifre. Cifre paid for the heroin (884-891).

Rodriguez only testified about a sale approximately six days after the sale to Angeoletti. He said Cifre came to him and said he had purchased heroin from Prada and had difficulty and wanted to buy directly from him and Gonzalez. They agreed to sell him 1/2 kilo for \$9,500.00. He delivered the heroin to Cifre's man and received payment from Cifre through Prada (155-161).

Both Gonzalez and Rodriguez testified about one sale to acquitted defendant, Hector Echevarria. Gonzalez said it was on March 13, after the sales to Angeoletti, Cifre and appellant Del Cristo. Rodriguez said it was three to five days after the sale to Angeoletti. Echeverria told

Rodriguez he wanted $\frac{1}{2}$ kilo. Rodriguez agreed to sell it to him for \$10,500.00. Rodriguez got the heroin from Ortega and went with Gonzalez to Echeverria's supermarket and delivered the heroin to Echeverria. They had a great deal of difficulty collecting from Echeverria. Cifre guaranteed \$2,000.00 of the debt, and Rodriguez got \$3,000.00 from Echeverria to bail Tapanes out of jail in July, 1970 (206-212, 874-883).

J. Rodriguez and Gonzalez Sell Heroin to Reyes and Infiesta.

In addition to Ortega telling Gonzalez he had sold 3 kilos to Reyes and Infiesta (See p. 5 supra) and Reyes and Infiesta receiving 1 or $1\frac{1}{2}$ kilos in Infiesta's apartment (See p. 8 supra) Gonzalez testified he and Ortega delivered 1 kilo to Reyes and a few days later he and Ortega delivered 2 kilos to Reyes and Infiesta at Infiesta's apartment (871-874). Gonzalez collected money from Reyes and Infiesta.

K. Rodriguez and Gonzalez Sell Heroin to Del Cristo.

The testimony of Rodriguez and Gonzalez as to deliveries of heroin to Del Cristo show startling conflicts. Gonzalez testified there were two deliveries by Rodriguez to Del Cristo. Rodriguez did not ever sell or deliver any heroin to Del Cristo. Rodriguez testified Del Cristo was looking for Ortega to buy heroin. Rodriguez informed Ortega who said he'd talk to Del Cristo. Rodriguez did recall receiving money from Del Cristo and that it was "short, or something" and taking the money to Gonzalez' aunt's house.

Once, Roberto Lopez, to whom Rodriguez had delivered heroin, told Rodriguez he had sold heroin which had been delivered to Del Cristo. Finally, Rodriguez said he had seen Del Cristo and Lopez together (47A-55A).

Gonzalez testified that he saw Rodriguez deliver $\frac{1}{2}$ kilo of heroin to Del Cristo in the parking lot of Prada's gas station within one hour after the sale to Angeoletti on March 13. None of the agents surveilling the station saw the delivery and Rodriguez had no recollection of it. Thereafter, Gonzalez, Rodriguez, Ortega, Del Cristo and Lopez met in the Gallo de Maron Bar. Del Cristo was attempting to purchase another $\frac{1}{2}$ kilo. According to Gonzalez, Ortega told Rodriguez, Del Cristo was a friend of his, had paid his share and authorized Rodriguez to deliver a second $\frac{1}{2}$ kilo to Del Cristo. According to Gonzalez, both Rodriguez and Ortega told him Rodriguez delivered a second $\frac{1}{2}$ kilo to Del Cristo. Rodriguez did not recall any deliveries to Del Cristo (64A-70A) (1484-1485, 1497-1498, 1524-1542).

L. Sales of Heroin to Others.

In addition to the sales of heroin already detailed the balance of the 45 kilos was sold by Ortega, Gonzalez, and Rodriguez to Juan Chaveco, convicted defendant Jose Otero, acquitted defendant Jose Angel Aguilera, Prada, Jose Luis Sarria, Roberto Lopez and Jose Ramirez-Ramos (242-247, 254-272, 946-950, 953-962, 969-971).

M. Handling of Money from Heroin Sales.

Rodriguez turned over the money he collected to Ortega. Gonzalez gave the money he collected to Ortega or Mr. or Mrs. Calana. Gonzalez went with Ortega to the building where Arenas lived. He waited downstairs while Ortega brought money up to Arenas. Ortega would bring \$20,000.00 - \$30,000.00 to Arenas at a time. Arenas received \$140,000.00 from Ortega which he gave to Caramian (118, 748-749, 861-863, 866-867).

N. Hotels, Cars, Bars, Telephone Calls, etc.

When in New York, Gonzalez, Ortega and Reyes stayed at the Paramount Hotel. Many of the deliveries of heroin and payments for the heroin were made at Prada's gas station which had previously been owned by Cifre, the '005 Bar, Gallo de Maron Bar, Cuba Bar and Blue Mirror Bar which photos and surveillance showed were frequented by Gonzalez, Figueroa, Infiesta, Rodriguez, Jose Ramirez-Ramos, Viera, Tapanes, Cifre, Del Cristo and Ortega (121, 184-193, 279-285, 296-302, 618-625, 633-638, 789-795, 1613-1618).

Ortega, Gonzalez and Rodriguez used cars belonging to Ortega and the Calanas on several occasions (625-633, 1575-1602). Also observed, was a car rented by Reyes and signed for by Infiesta (1602-1605). Telephone slips showed that during April and May, 1970, there were calls from Reyes in Florida to Infiesta in New York (Gov. Ex. 22, 1556-1568).

O. End of Conspiracy.

Rodriguez continued to collect money for the heroin they had sold until August or September, 1970. The last payment was from Echeverria. Rodriguez participated in the sale of approximately 20 kilos. At the final accounting among Rodriguez, Gonzalez and Ortega there was an argument about the disappearance of the 9 ounces taken out of each kilo when they mixed and cut the heroin. Ortega and Gonzalez accused Rodriguez of taking that heroin (274-277).

P. Exculpatory Statements.

1. Ortega - When arrested on April 1, 1971, Ortega told Government Officials he hadn't been in New York or New Jersey for two years (1481-1482).

2. Del Cristo - After being arrested, Del Cristo when interviewed about a conspiracy to sell heroin in March and April, 1970, said it couldn't have happened since he was in the hospital and had the scars to prove it. While admitting he knew Echeverria, Rodriguez and Gonzalez, he said he didn't recall Ortega (1710-1724).

Q. The Defense.

Acquitted defendant, Francisca Ortega-Rodriguez (Mrs. Calana), established through her employment records, as well as the testimony of an official of her employer, Marva Industries, a fellow employee and her own testimony, that in February, March and April she worked six days a

week (Monday through Saturday) from before 7 A.M. until 5 P.M. and could not leave the factory during those hours. Mrs. Calana denied knowing Rodriguez, Gonzalez or Arenas, and specifically denied their accusations as to her participation in the conspiracy. She also testified her children were home in the mornings during the week and returned home from school about 4 P.M. She also testified that her sister did not come to the United States from Cuba until 1971 (1861-1879, 1883).

In rebuttal the Government showed that Mrs. Calana's sister lived in Elizabeth, New Jersey, in 1970 and that Mrs. Calana's son left school in Elizabeth on March 16, 1970 (1993-2000).

Appellant Calana introduced records to show he was employed from January to June, 1970, but could not produce the records to show the days and hours of his employment due to the unavailability of the records because of the firm's bankruptcy (1853-1861).

Appellant Cifre called his brother as a witness to testify Cifre was in Puerto Rico from the middle of June, 1970, until the beginning of August, 1970, during which time he was supposed to be paying money to Gonzalez in New York (1922-1932).

Acquitted defendant Echeverria established that Rodriguez, not Echeverria, gave the \$3,000.00 to the

bondsman for Tapanes' bail (1898-1905). He also offered the testimony of three prisoners, who testified that on various occasions Rodriguez and Gonzalez attempted to induce them to cooperate with the Government, even if it meant giving false testimony. Two of them testified that Rodriguez and Gonzalez admitted giving false testimony (1939-1945, 1949-1950, 1966-1970). In rebuttal the Government called the attorney of one of the prisoners who was present during one of these conversations in Spanish. In his later discussion of the conversation he had no recollection that his client said Rodriguez asked him to testify falsely (1988-1992A).

POINT ONE

THERE WAS INSUFFICIENT
EVIDENCE AGAINST DEL
CRISTO TO SUBMIT THE
CASE TO THE JURY

A. Insufficient Evidence.

A study of the trial testimony against appellant Del Cristo shows that the evidence against him was insufficient for the case against Del Cristo to have been submitted to the jury.

The new test laid down by this Court in United States v. Taylor, 464 F. 2d 240 (2d Cir. 1972) is whether there is any evidence upon which a reasonable mind might fairly conclude appellant's guilt beyond a reasonable doubt.

If there is no such evidence the trial judge should grant a motion to acquit.

Looking at the Government's case in the best light, as this Court must, it falls short of evidence sufficient for submission of the case against Del Cristo to the jury.

Before the trial court submitted the case against Del Cristo to the jury, it had to be shown from a preponderance of the non-hearsay evidence that Del Cristo was a participant in the conspiracy. United States v. Fantuzzi, 463 F. 2d 683 (2d Cir. 1972).

"Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of non-hearsay evidence that the latter was a party to the conspiracy. See, Glasser v. United States, 315 U.S. 60, 74 (1942); United States v. Geaney, 417 F. 2d 1116 (2d Cir.), cert. denied sub nom. Lynch v. United States, 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See, Flintkote Co. v. Lysfjord, 246 F. 2d 368, 387 (9th Cir.) cert. denied, 355 U.S. 835 (1957)." United States v. Cirillo, Docket #73-2426. Slip Opinion pp. 3315-3316 (2d Cir. May 7, 1974).

A study of the non-hearsay testimony against Del Cristo will satisfy this Court that there was insufficient evidence upon which to submit the case to the jury.

Rodriguez testified Del Cristo told him he was trying to find Ortega to buy heroin from him. He further testified that once Del Cristo brought money to him at the 005 Bar and there was some problem with it. Rodriguez affirmatively denied four times that he ever sold or delivered any heroin to Del Cristo (47A-55A).

Gonzalez testified he spoke to Del Cristo about the shipment of heroin on March 12, 1970, and he and Rodriguez arranged for the delivery of $\frac{1}{2}$ kilo of heroin. Gonzalez said on March 13th he saw Rodriguez deliver a package to Del Cristo at Prada's gas station. Gonzalez told Del Cristo it had taken a long time to pay the money for the heroin and he, Gonzalez, needed the money. The remainder of the testimony of Gonzalez is rank hearsay. Much of it contains conversations when Del Cristo was in the vicinity, but there was no showing Del Cristo heard the conversations and adopted them (64A-70A). United States v. Fantuzzi, supra at page 690.

The trial court, of course, was not bound to weigh the credibility of the Government's witnesses, that was for the jury. But, in determining whether the Government showed by a fair preponderance of the evidence that there was sufficient evidence against Del Cristo to submit to the jury, the trial court had to consider all of the evidence, namely, both the testimony of Rodriguez and Gonzalez. Gonzalez'

testimony that Rodriguez delivered a package (heroin) to Del Cristo, had to be considered with Rodriguez' four affirmative statements that he never sold or delivered any heroin to Del Cristo. All there is left are discussions by Del Cristo with Rodriguez and Gonzalez about the heroin shipment, one payment of money by Del Cristo to Rodriguez, without discussion, and a discussion between Del Cristo and Gonzalez about paying money faster.

The non-hearsay evidence against Del Cristo was not of such quality that " . . . a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Freeman, Docket #74-1238, Slip Opinion, p. 4013 (2d Cir. June 7, 1974).

Suspicious circumstances, conversations with other defendants about narcotics they are selling, and payments of money are insufficient to show that Domingo Del Cristo knowingly associated himself with the conspiracy to sell heroin. As to the substantive count, there is no non-hearsay evidence of the so-called second sale to Del Cristo and only the tenuous testimony of Gonzalez about the delivery of the package by Rodriguez (which Rodriguez denied) to Del Cristo on March 13. Surely, this was insufficient to submit to the jury on Count Six which charges Del Cristo with the purchase of one kilo of heroin.

The statement Del Cristo made to the Assistant

United States Attorney upon his arrest, that he was in the hospital in March and April, 1970, and had the scars to prove it, which the Government relied on as a false exculpatory statement, add little, if any, strength to the sufficiency of the Government's case. The statement was made in October, 1973, more than three and one-half years after the conspiracy and could easily be explained by the lapse of time. Such a statement could not tip the scale and make the Government's proof against Del Cristo sufficient to submit to the jury.

B. The Government Failed To Prove Del Cristo "Possessed" Heroin.

The indictment in this case charged violations of Title 21, United States Code, Sections 173 and 174, and Title 26, United States Code, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a). At the outset of trial, the Government elected to proceed on the violations of Title 21, Sections 173 and 174 which requires that the Government prove beyond a reasonable doubt that: (1) the heroin involved herein was illegally imported; and (2) that defendant Del Cristo knew that the heroin was illegally imported. Since there was no testimony to establish these two elements, the Government must rely upon the fact that the statute authorizes conviction upon a showing that the defendant had possession, unless the possession is explained by the defendant.

We have already discussed the insufficiency of Gonzalez' testimony about Rodriguez' delivery of a package to Del Cristo. Based upon Rodriguez' four affirmative denials that he ever sold or delivered heroin to Del Cristo, there was an insufficient showing of actual possession.

If the Government is to prove possession, it must rely upon Del Cristo's having constructive possession of the heroin. This Court has defined constructive possession "to encompass power to control the disposition of drugs as well as mere physical custody. . . ." United States v. Jones, 308 F. 2d 26, 30 (2d Cir. 1962), (en banc); See also United States v. Santore, 290 F. 2d 74 (2d Cir.) (rehearing en banc), cert. denied, 365 U.S. 834 (1961); United States v. Hernandez, 290 F. 2d 86 (2d Cir. 1961).

Two elements to be considered by this Court in determining whether Del Cristo had constructive possession are:

1. Who set the price?
2. Did the defendant have the ability to assure delivery?

United States v. Febre, 425 F. 2d 107, 111-112 (2d Cir. 1970).

A review of these elements and all other possible criteria of determining whether a defendant had constructive possession of narcotics shows Del Cristo never had constructive possession of any heroin. He had nothing to do with

negotiating or fixing the price, and surely was not able to assure the delivery of this heroin. Although factually, this case is different from the Jones case, the activities of Del Cristo are such as to be insufficient for a finding of constructive possession. He discussed the heroin with Rodriguez and Gonzalez, delivered money to Rodriguez and discussed the payment of money with Gonzalez, but this is not sufficient for conviction of violation of 21 U.S.C. Section 174.

"As far as the record discloses, defendant did nothing more than introduce a willing buyer to a willing seller and to serve as a go-between until such time as the willing seller and willing buyer were satisfied to do business with each other. Nothing in the record indicates that Jones had any independent control over the narcotics, or over Moore, or that he was able to assure to Brown that he could produce narcotics. And, unless we are to read the statutory phrase 'possession of the narcotic drug' to mean merely 'participation in a transaction involving the narcotic drug' we cannot rely upon constructive possession here to affirm the conviction below." United States v. Jones, supra at page 31.

While the Government charges violation of the aiding and abetting statute, Title 18, United States Code, Section 2, this Court has held the Government must still show the aider and abettor had possession of the heroin. United States v. Jones, supra p. 31-33.

The requirements stated above apply equally to the conspiracy charge and the sale charged in Count Six. United States v. Hysohion, 448 F. 2d 343, 347 (2d Cir. 1971).

Having failed to prove that Del Cristo possessed heroin the indictment should have been dismissed.

POINT TWO

THERE WAS INSUFFICIENT
EVIDENCE PRESENTED TO
THE GRAND JURY UPON
WHICH TO INDICT DEL CRISTO
FOR THE PURCHASE OF HEROIN
AND CONSPIRACY

The Fifth Amendment to the United States Constitution provides in part that:

"No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury. . . "

Appellant Del Cristo was indicted in Count Six of Indictment 74 Cr.18 and its predecessor 73 Cr.950 for the receipt, concealment, purchase, sale and facilitation of the transportation, concealment and sale of approximately one kilo of heroin. In Count One he was indicted for conspiracy with twenty-one other defendants and two co-conspirators for conspiracy to receive, conceal, purchase, sell and facilitate the transportation, concealment and sale of heroin.

The Grand Jury, allegedly an independent body, heard evidence from only one witness regarding appellant Del Cristo before returning the indictment. That witness was Ramiro Gonzalez. The answers given by Gonzalez to questions

from an Assistant United States Attorney before the Grand Jury were:

"Q. Did you arrange to sell half a kilo of heroin to Domingo Del Cristo?

A. Yes.

Q. And was that arrangement made at the Gallo de Maron Bar?

A. Yes.

Q. And did you arrange to sell another half a kilo after that?

A. Yes, but it was Raul that authorized that."

(38A).

While the Supreme Court in Costello v. United States, 350 U.S. 359 (1964) approved the use of hearsay before the Grand Jury, no court has ever approved an indictment based upon testimony such as offered against Del Cristo before the Grand Jury. Brady v. United States, 24 F.2d 405 (8th Cir. 1928); United States v. Farrington, 5 Fed. 343 (N.D.N.Y. 1881).

There is no testimony that Gonzalez made the arrangements at the Gallo de Maron Bar with Del Cristo. There is no indication with whom Gonzalez made the arrangements. There is no testimony that any sale or purchase of narcotics was made by Del Cristo. There is absolutely no testimony that Del Cristo did or said anything with regard to narcotics. As to the second half kilo there is no

mention of Del Cristo at all. It is not even clear that this question and answer even relates to Del Cristo because the following question and answer was:

"Q. Did you arrange to sell a half kilo to someone by the name of Felicipe?

A. Yes".

(38A).

Was Gonzalez referring to Del Cristo, Felicipe, or someone else when testifying that Raul authorized the sale of another half kilo? How could the Grand Jury indict Del Cristo for the substantive crime in Count Six without any testimony of a sale of heroin to Del Cristo? Duarte v. United States, 171 F.2d 971,972 (5th Cir. 1949).

Judge Learned Hand of this Court recognized the need for competent evidence before the Grand Jury in the Costello case:

"We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated" United States, v. Costello, 221 F. 2d 668, 677 (2d Cir. 1955).

The Grand Jury cannot be abdicated. While courts require little proof before the Grand Jury, and permit hearsay, we cannot permit the United States Attorney to determine who should be indicted. Sufficient evidence, presented in a clear, coherent manner, without misleading the Grand

Jury, is the least that can be expected. United States v. Estepa, 471 F. 2d 1132 (2d Cir. 1972).

The manner in which this case was presented to the Grand Jury can be seen from the handling of the case against defendant Jose Angel Aguilera before the Grand Jury. The Government learned shortly before the trial that Aguilera had not been mentioned at all before the Grand Jury that returned Indictment 73 Cr.950. In January, 1974, the Government recalled Rodriguez before the same grand jury. He then testified about Aguilera's activities and Indictment 74 Cr.18 resulted. While Del Cristo had been mentioned before the Grand Jury there was no testimony he did or said anything. There was no basis for the Grand Jury to indict him in Counts One and Six.

POINT THREE

THE EVIDENCE FAILED TO SHOW A SINGLE CONSPIRACY

Indictment 74 Cr.18 charged in Count One a single conspiracy to import and distribute heroin. The proof at the trial showed that Ortega, Rodriguez and Gonzalez did, in fact, sell the heroin to various people in the New York metropolitan area. There were at best, two one-half kilo sales to Del Cristo. There was no showing Del Cristo knew of any other sales made by Ortega, Rodriguez or Gonzalez.

As a customer, he had no interest in the dealings they may have had with other customers. He had no stake in the outcome of their dealings with others.

"Although it is usual and often necessary in conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant." United States v. Borelli, 336 F. 2d 376, 384 (2d Cir. 1964).

The Government cannot charge several conspiracies in one count of an indictment, nor can they charge one conspiracy and prove many. Kotteakos v. United States, 328 U.S. 750 (1946), United States v. Boyle, 338 F. Supp. 1028 (D.D.C. 1972).

"The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy

In essence the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy. However, where various defendants separately conspired with a common conspirator to obtain fraudulent loans from an agency of the United States, the government conceded that there were several conspiracies since there was no overall goal or common purpose. [Citation omitted]". United States v. Varelli, 407 F. 2d 735, 742 (7th Cir. 1969), cert. denied 405

U.S. 1040 (1972).

The Government, instead of proving one conspiracy, proved various conspiracies, between the "core group" (Ortega, Rodriguez and Gonzalez) and the various customers.

"The only thing in common was the law they were breaking. Consequently, the single conspiracy of the indictment falls apart when the conduct of the defendants is seen to consist of several instead of a sole combination" United States v. Gross, 329 F.2d 180, 183 (4th Cir. 1964).

Upon the facts of the case the variance between the indictment charging one conspiracy and the proof of several conspiracies at trial prejudiced Del Cristo. Instead of a simple case involving one or two sales of heroin, he was thrown into a mass conspiracy trial involving thirteen defendants, forty-five kilos of heroin and all of the prejudice attendant in such a trial. United States v. Russano, 257 F.2d 712, 715 (2d Cir. 1958); See also, United States v. Varelli, supra at page 744; United States v. Gross, supra at page 184.

As the Supreme Court stated in Kotteakos supra,

"But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the

conviction cannot stand." 328 U.S. at 765.

The prejudicial variance on the conspiracy count also requires reversal and the granting of a new trial to appellant Del Cristo from his conviction on the substantive count since the verdict of the jury on this count may have been influenced by the evidence improperly admitted against appellant Del Cristo. United States v. Schaeffer, 362 U.S. 511 (1960); Kotteakos v. United States, supra; United States v. Varelli, supra.

POINT FOUR

APPELLANT DEL CRISTO
ADOPTS THE ARGUMENTS
OF OTHER APPELLANTS
WHERE APPLICABLE TO HIM.

CONCLUSION

FOR THE FOREGOING REASONS THE
JUDGMENT SHOULD BE REVERSED
AND THE CASE DISMISSED OR A
NEW TRIAL GRANTED.

Respectfully submitted,

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